No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the Supreme Court of Mississippi

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
(601) 656-5251

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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ARGUMENT

I.

The Mississippi Band of Choctaw Indians Has Standing to Contest the Adoption of the Choctaw Infants.

In this appeal seeking to have an off-reservation state court adoption of twin Choctaw Indian infants of reservation parents declared void for lack of jurisdiction, the Appellees have moved to dismiss con-

tending initially that Appellant Indian tribe, the Mississippi Band of Choctaw Indians, lacks Article III standing to contest this adoption of its tribal children. Yet Appellees' brash assertion that "Quite simply, what is presented to this Court is an organization, and nothing more, disagreeing and protesting whether the natural parents of two illegitimate children may put them up for adoption when the natural parents have determined that it is in the best interest and welfare of the children" [Appellees Br. 3] disregards the controlling, preemptive federal law—Indian Child Welfare Act of 1978, 25 U.S.C. §§1901 *et seq.*—granting Indian tribes special standing in adoption and placement proceedings over their tribal children and vesting exclusive tribal court jurisdication over adoptions of reservation resident and domiciled tribal children; substitutes for Appellant's substantive federal claims of no state court jurisdiction and of infringement upon upon tribal sovereignty the Appellant's characterization of the tribe's objections as mere disagreement with the natural parents' determination of the children's best interest and welfare; and misplaces reliance for Appellees' newly contrived position upon the claimed authority of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

Congress' expressed finding in 25 U.S.C. §1901(3) "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" together with the Congressional Declaration of Policy "to protect the best interest of Indian Children and promote the stability and security of Indian tribes and families" (25 U.S.C. §1902) by *inter alia* vesting tribal court "jurisdiction exclusive

as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" [25 U.S.C. §1911(a)] and providing that "the Indian child's tribe shall have a right to intervene at any point in . . . any State court proceeding for the . . . determination of parental rights to, an Indian child" [25 U.S.C. §1911(c)] collectively and cumulatively dispatch all points of argument Appellees raised initially in their Motion to Dismiss.

Appellees reliance on *Valley Forge Christian College v. Americans United for Separation of Church and State, supra,* is misplaced in that it equates the Appellant Indian tribe with a taxpayers organization not enjoying the expressed federal statutory standing cited in the paragraph above. Although federal statutes creating new interests cannot go beyond Article III's requirement of "injury in fact" [*Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)], the legislative history to the Indian Child Welfare Act confirmed and embraced the case holding of *Wakefield v. Little Light*, 276 Md. 333, 347 A.2d 228 (1975) which states:

> ". . . there can be no greater threat to essential tribal relations; and no greater infringement on the rights of the Crow Tribe to govern themselves than to interfere with tribal control over the custody of their children. . . ." 347 A.2d 228, at 237-238.

Clearly Article III standing requirements relating to "injury in fact" are met by the terms of the statute and by the facts of the situation.

Throughout Argument I of Appellees' brief on its Motion to Dismiss Appellant's position is miscast as a disagreement over opinion or attitude toward reservation life and, without citing authority, Appellees assert that "it is up to the individual Choctaw Indian to decide if he or she chooses to bring a controversy to the tribal court or to a state court, so long as that state's court possesses jurisdiction as well". [Appellees Br. 5] While maintaining a standing objection to Appellees' recharacterization of Appellant's arguments and position, Appellant also disagrees that any choice of forums does or could exist in this case. In *Fisher v. District Court*, 424 U.S. 382 (1976), this Court in holding the tribal jurisdiction is exclusive in Indian adoption cases where all parties are reservation Indians said:

> Finally, we reject the argument that denying the Runsaboves access to the Montant courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdiction holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government. *Morton v. Mancari*, 471 U.S. 535 (1974).

424 U.S. 390-391.

None of Appellees' objections pertaining to standing are supportable and Appellant's arguments and

authorities cited above clearly refute the contentions of Argument I of the Motion to Dismiss. The Motion should be denied and plenary judgment for Appellant should be granted or brief on the merits and oral arguments should be ordered.

II.

The Decision of the Mississippi Courts Is in Conflict with Prior Decisions of This Court, Is a Matter Before This Court Which Should be Decided, And Is in Conflict With Other Circuits.

Appellees' broad libertarian claim to seemingly unfettered fundamental rights "to be a parent (or not be a parent), . . . to control the health, education, and welfare of one's child, . . . to procreate, and even . . . to travel to and fro" [Appellees Br. 6] are not the subject of challenge by Appellant tribe but Appellees' assertion (curiously under the claimed authority of the Ninth Amendment, United States Constitution[1]) that "It is the right of the State to define the perimeters [*sic*] from which it will grant jurisdiction before its courts" [Appellees Br. 7] raises anew the very question decided ten years ago in the tribe's favor in *United States v. John*, 437 U.S. 634 (1978). Though admittedly not decided on the basis of a Ninth Amendment claim, the unanimous ruling of this Court was that Mississippi's courts could not exercise their jurisdiction over Indians within the state in circumstances where federal plenary law over Indian affairs

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[1] Amendment IX, U.S. Constitution provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

divested the state of jurisdiction and instead conferred it exclusively in federal and/or tribal court. The Mississippi Supreme Court's ruling, therefore, that the residency of a minor is dependent upon the intent of the parent, if indeed a fair characterization of the opinion, could possibly be a legitimate basis for granting jurisdiction before its courts but only if the state has not been divested of its jurisdiction by some plenary exercise of power by Congress. 25 U.S.C. §1911(a) clearly divests the state of any adoption jurisdiction it may ever have had over children of reservation resident and domiciled parents and *Fisher v. District Court, supra,* tends to indicate that no state jurisdiction existed even before this 1978 statutory divestment.

The sole decision Appellant has found from another circuit substantially in agreement with the Mississippi Supreme Court was a 1983 unreported denial of a Writ of Prohibition in a state adoption of a Laguna Pueblo infant born off-reservation to a reservation mother and father out-of-wedlock. Both the Pueblo and the father took an appeal to this Court which granted leave for the filing of an amicus brief and postponed consideration of the jurisdiction question to the hearing of the case on the merits, *Pino v. District Court of the Second Judicial District's Children's Court,* 471 U.S. 1014 (1985) invited the Solicitor General to file a brief expressing the views of the United States, Id. ___ U.S. ___ , and dismissed the case under Rule 53 after the Court of Appeals of New Mexico in a reexamination of the case voided the adoption for lack of jurisdiction. *Matter of Adoption of Baby Child,* 700 P.2d 198 (N.M.App. 1985). It therefore appears that the single jurisdiction to have ruled in

conformity with the Mississippi Court reversed its position once it became evident this Court would probably be granting review on the case.

CONCLUSION

For the aforestated reasons Appellant Mississippi Band of Choctaw Indians submits that the Appellees' Motion to Dismiss should be denied.

Respectfully Submitted

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
(601) 656-5251

Counsel for Appellant

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